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11 DONALD J. TRUMP

12 STEPHANIE CLIFFORD a.k.a.
13 STORMY DANIELS,

14 Plaintiff,

15 v.

16 DONALD J. TRUMP,

17 Defendant.

18 Case No. 2:18-cv-06893-SJO-FFM

19 **REPLY IN SUPPORT OF SPECIAL
MOTION OF DEFENDANT
DONALD J. TRUMP TO
DISMISS/STRIKE COMPLAINT
PURSUANT TO ANTI-SLAPP
STATUTE OR, ALTERNATIVELY,
TO DISMISS COMPLAINT
PURSUANT TO FRCP 12(b)(6)**

20 Assigned for All Purposes to the
21 Hon. S. James Otero

22 **Date: September 24, 2018**
23 **Time: 2:00 p.m.**
24 **Location: 350 West 1st Street
Courtroom 10C, 10th Floor
Los Angeles, CA 90012**

25 Action Filed: April 30, 2018

1 **I. INTRODUCTION**

2 Plaintiff Stephanie Clifford (“Plaintiff”) seeks to gain an advantage over
 3 Defendant Donald J. Trump (“Defendant”) in another lawsuit by filing in this case
 4 what is obviously a SLAPP suit. She contends that a tweet that her own lawyer called
 5 a “gift from the heavens,” in which Defendant suggests that a claim she made about
 6 being threatened seven years earlier was not credible, is somehow actionable and has
 7 destroyed her reputation. The motion should be granted for any and all of the
 8 following reasons:

9 1. The timing provisions of anti-SLAPP statutes do not apply in federal
 10 court pursuant to controlling Ninth Circuit law. Even if timing provisions did apply,
 11 judicial discretion is permitted and good cause exists here to excuse any time limit
 12 issues because Plaintiff originally filed this action in the wrong jurisdiction—New
 13 York—a state that had nothing to do with the facts of this case, and Defendant’s anti-
 14 SLAPP motion was filed shortly after the case was transferred to this District.

15 2. Texas law governs the instant motion.

16 3. The motion alleges defects in the pleadings and legal deficiencies in
 17 Plaintiff’s claims, and thus may be resolved prior to discovery.

18 4. Read in context, the comment within the tweet at issue (the “Comment”)
 19 states an opinion regarding the veracity of Plaintiff’s claim that she was threatened.
 20 The controlling case law rejects Plaintiff’s overly-literal reading of the Comment.

21 5. Plaintiff is required to plead special damages; she has not done so in the
 22 Complaint and her declaration submitted with her Opposition shows that she has no
 23 factual basis to allege that her security costs were caused by the Comment.

24 This is exactly the sort of lawsuit that anti-SLAPP laws were intended to deter.

25 **II. THE MOTION WAS TIMELY FILED**

26 The Ninth Circuit has held that while the substantive provisions of anti-SLAPP
 27 statutes apply in U.S. District Courts, the time limitations do not. *Metabolife Int’l,*
 28 *Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (holding that the 60-day time

1 limitation in Cal. Code Civ. Proc. § 425.16(f), which is identical to the Texas
 2 provision, **does not apply** in federal court). This aspect of *Wornick* controls this case
 3 and forecloses Plaintiff's argument.

4 Independently, the Texas statute states that the 60-day time period can be
 5 excused upon a showing of good cause. *See Schimmel v. McGregor*, 438 S.W.3d 847,
 6 856 (Tex. App. 2014) (upholding trial court's finding of good cause to excuse the time
 7 limitation). Here, Plaintiff filed her action in New York, a jurisdiction with no
 8 relationship to the case. On July 23, 2018, Defendant moved to transfer the case to
 9 this District. On August 8, 2018, Plaintiff stipulated to the transfer, and once the case
 10 was transferred here, Defendant timely filed an anti-SLAPP motion. Moreover, in an
 11 e-mail, Plaintiff's counsel stated Plaintiff's position that Defendant has 21 days from
 12 the date of the transfer to respond to the Complaint. The instant motion was filed
 13 within that time period. Under these circumstances, good cause exists to excuse any
 14 60-day time limitation (if it applied, which it does not), because Defendant did not
 15 delay, acted promptly after transferring the case to an appropriate court, and filed the
 16 motion within the time-frame stated by Plaintiff.¹

17 **III. TEXAS SUBSTANTIVE LAW GOVERNS THIS ACTION**

18 As set forth in the moving papers, New York conflicts principles govern this
 19 action. Plaintiff does not dispute this point, which is controlled by Ninth Circuit
 20 precedent. *Sarver v. Chartier*, 813 F.3d 891, 897 (9th Cir. 2016). Plaintiff fails to
 21 cite any New York conflicts cases that hold that a statement by a Washington D.C.
 22 resident that allegedly defames a Texas resident is governed by New York law.
 23 Rather, New York conflicts principles are clear that the law of the state of the
 24

25 ¹ Nor did Defendant violate Local Rule 7-3. Defendant conducted a meet-and-confer
 26 discussion on August 20, 2018. [Harder Decl., ¶ 21.] The fact that the discussion
 27 continued beyond that date does not require a delay in filing a motion; otherwise, a
 28 party wishing to avoid a motion could simply string out the meet-and-confer process
 with additional calls and meetings, with no end.

1 plaintiff's residence applies to a defamation claim. *Locke v. Aston*, 814 N.Y.S.2d 38,
 2 42 (N.Y.A.D. 2006); *Sondik v. Kimmel*, 16 N.Y.S.3d 296, 298 (N.Y.A.D. 2015).

3 The cases cited by Plaintiff are not to the contrary. *Condit v. Dunne*, 317
 4 F.Supp.2d 344, 353 (S.D.N.Y. 2004), applies New York conflicts rules to hold that
 5 the law of the state of the Plaintiff's residence applies to a defamation claim. Each of
 6 the other cases cited by Plaintiff applies California conflicts rules, which do not apply.

7 **IV. PLAINTIFF IS NOT ENTITLED TO DISCOVERY**

8 While some anti-SLAPP motions are effectively summary judgment motions
 9 and may not be heard until after discovery, this is not such a motion. The issue of
 10 whether the Comment is a non-actionable opinion is a **matter of law**. *Musser v.*
 11 *Smith Protective Services*, 723 S.W.2d 653, 655 (Tex. 1987) (holding that whether
 12 statement would be given a defamatory meaning by a reasonable reader is a question
 13 of law decided by the court). Similarly, special damages are a pleading requirement
 14 under Texas law. *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex.
 15 App. 2013) (holding that both "allegation and proof" of special damages are required
 16 to recover). Thus, neither the issue of defamatory meaning, nor the issue of special
 17 damages, requires discovery before it can be resolved.

18 **V. THE COMMENT IS A PROTECTED OPINION**

19 Contrary to Plaintiff's contentions, the Comment communicates opinions rather
 20 than false statements of fact. Plaintiff claims the Comment includes two false
 21 statements of fact: (#1) that Plaintiff is lying when she says she was threatened, and
 22 (#2) that Plaintiff is a "confidence man." [Opposition, p. 13.] Plaintiff is wrong.

23 In *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004), the Texas
 24 Supreme Court held that the test is whether "a person who exercises care and
 25 prudence, but not omniscience, when evaluating allegedly defamatory
 26 communications" would read the statement as making a factual claim.

27 Statement #1 cannot be reasonably read as making a factual statement. On its
 28 face, the Comment contains no suggestion that Defendant was an eyewitness to the

1 alleged event in Las Vegas, nor does it otherwise imply any personal knowledge by
 2 Defendant. The only reasonable construction of the Comment is that it contains a
 3 statement of opinion – namely, Defendant’s calling into question the veracity of
 4 Plaintiff’s assertion that the incident occurred. *See Dallas Morning News, Inc. v.*
 5 *Tatum*, 2018 WL 2182625 (Tex. 2018).

6 Plaintiff argues that because she and Defendant are parties to a different
 7 lawsuit, any opinion Defendant expresses about her credibility on any subject should
 8 be viewed as relating to that other dispute, and is therefore actionable. Under the
 9 standard advanced by Plaintiff, any litigant who says that his or her opponent is not
 10 credible could be sued for defamation, even with respect to a matter unrelated or
 11 tangentially related to the litigation. That is not the law, nor can it be. Every citizen
 12 involved in a public dispute has the right to comment on the credibility of the person
 13 on the other side.

14 For the same reasons, Statement #2 also is an opinion. The Comment did not
 15 call Plaintiff a “confidence man,” as the Opposition argues. It states, “total con
 16 job”— a reference to Plaintiff’s claim of being threatened. It is simply a more
 17 colorful, hyperbolic recitation of the same opinion: that Plaintiff’s claim of an alleged
 18 threat is not credible.

19 Plaintiff argues that the Comment is not an opinion because it does not use
 20 words like “I think” or “I feel.” However, numerous cases hold categorical, yet
 21 hyperbolic, statements to be protected opinions. *Greenbelt Cooperative Publishing*
 22 *Ass’n v. Bresler*, 398 U.S. 6, 13 (1970) (accusation of “blackmail” to describe a
 23 negotiating position, without qualifiers, held not actionable); *National Ass’n of Letter*
 24 *Carriers v. Austin*, 418 U.S. 264, 283 (1974) (use of the word “scabs,” without
 25 qualifiers, held not actionable); *Rehak Creative Services, Inc. v. Witt*, 404 S.W.3d
 26 716, 729 (Tex. App. 2013) (use of the words “ripping off” and “bilking,” without
 27 qualifiers, held not actionable).

28 **VI. PLAINTIFF HAS FAILED TO PLEAD SPECIAL DAMAGES**

1 Plaintiff argues that she need not plead special damages because Defendant
 2 accused her of a crime. Defendant did no such thing, and Plaintiff fails to identify
 3 any criminal statute that bars a person from publicly falsely accusing another (other
 4 than to the police) of threatening him or her. The governing Nevada statute does not
 5 apply so long as no report was made to law enforcement. Nev. Rev. Stat. § 287.280.
 6 Plaintiff admittedly did not report the alleged threat to law enforcement.

7 Plaintiff also does not and cannot plead special damages. Plaintiff admits that
 8 she was **already incurring** the security costs she claims as damages due to her earlier
 9 disputes with Defendant. [Clifford Decl., ¶ 5] (“I have had to **continue to retain** the
 10 services of professional bodyguards and other protective services to ensure my
 11 personal safety.”) (emphasis added). Plaintiff’s declaration does not state that her
 12 security bill increased shortly after the Comment—thus, it appears she has abandoned
 13 her claim in the Complaint that her security increased as a result of the Comment.

14 The Complaint and Plaintiff’s declaration do not plausibly allege special
 15 damages. *Cunningham v. Blue Cross Blue Shield*, 2008 WL 467399 at *5 (Tex. App.
 16 2008) (plaintiff must allege and prove that defendant’s conduct was a substantial
 17 factor in causing damages); *Southern Electrical Services, Inc. v. City of Houston*, 355
 18 S.W.3d 319, 324 (Tex. App. 2011) (damages are speculative and non-recoverable
 19 where no evidence of connection between defendant’s conduct and damages);
 20 *Westech Engineering, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 205
 21 (Tex. App. 1992) (damages not recoverable where no evidence tied damage to
 22 defendant’s conduct); *In re Eastman*, 419 B.R. 711, 734-35 (W.D. Tex. 2009) (“[T]o
 23 recover special damages, a plaintiff must show that the damages were reasonably
 24 foreseen by both parties.”); *Pedreira v. Kentucky Baptist Homes for Children, Inc.*,
 25 579 F.3d 722, 728 (6th Cir. 2009) (affirming dismissal where plaintiff failed to plead
 26 facts supporting causal relationship between defendant’s action and her religion).

27 **VII. CONCLUSION**

28 For the foregoing reasons, the motion should be granted.

1 Dated: September 10, 2018

HARDER LLP

2 By: */s/ Charles J. Harder*
3 CHARLES J. HARDER
4 Attorneys for Defendant
5 DONALD J. TRUMP

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